DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 15-00659
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

04/24/2017

Decision

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 31, 2009. On October 17, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline E. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant answered the SOR on December 9, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 25, 2016, and the case was assigned to another Administrative Judge on August 12, 2016. On January 12, 2017, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for February 2, 2017. On January 30, 2017, the case was transferred to me, and I convened the hearing as scheduled.

Government Exhibits (GE) 1 through 3, 5 through 9, and 11 through 14 were admitted into evidence without objection. I admitted GE 4 and 10 over Applicant's objection. I appended a letter that Government sent to Applicant as Hearing Exhibit (HE) I and Government's exhibit list as HE II. At the hearing, Applicant testified but did not submit any documents. At Applicant's request, I left the record open to March 2, 2017, and then I *sua sponte* kept the record open to March 24, 2017. I timely received documents that I admitted as AE A without objection. DOHA received the transcript (Tr.) on February 13, 2017.

SOR Amendment

At the hearing, I granted Department Counsel's motion to amend the SOR to correct a typographical error in the section reference in SOR ¶ 1.k from 24 to 23, without objection from Applicant.[1]

Findings of Fact[2]

Applicant, age 29, has been married for almost three years.[3] He has one child born of this marriage, who is two years old.[4] He received his G.E.D. in 2006. He served in the U.S. Army from 2006 through 2008, when he was involuntarily separated by a general discharge under honorable conditions.[5] While in the military, he earned college credits as a lab technician and phlebotomist. Later, he earned multiple Information Technology (IT) certifications.[6] He has been employed as an IT technician full time by federal contractors for over six years, including over four years with his current employer.[7] Applicant has held a security clearance since 2006.[8]

In his SOR answer, Applicant denied each of the 12 allegations. During his hearing, he amended his answer to the SOR to admit the allegations in SOR ¶¶ 1.a through 1.e, 1.g, and 1.i,[9] and affirmed his denial of the allegations in SOR ¶¶ 1.f, 1.h, and 1.j through 1.l.[10]

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[1] Tr. at 48.

[2] Unless otherwise indicated by citation to another part of the record, I extracted these facts from Applicant's SOR answer, SCA (GE 1), and the summaries of his personal subject interviews (SI), which Applicant adopted as accurately reflecting the facts discussed during his December 11, 2009 and October 21, 2009 interviews (GE 2 at 3-13 and 26).

[3] *See also* Tr. at 69.

[4] Tr. at 69-70.

[5] GE 11.

[6] Tr. at 13.

[7] Tr. at 14 and 71-72.

[8] *See also* Tr. at 14-15.

[9] Tr. at 50-63

Applicant assaulted individuals during fights that occurred in 2005 while he was in high school at age 17 (SOR ¶ 1.a) and in 2006 while he was in the military at age 18 (SOR ¶ 1.b).[11] At hearing, he acknowledged wrongdoing in both instances and attributed his actions to peer pressure and immaturity.[12] Applicant denied committing an assault as charged in November 2010 (SOR ¶ 1.h), but did admit to engaging in a shouting match with a woman who believed he was threatening.[13] Given the lack of evidence of any assault, the nature of the incident, and the fact that the associated criminal charges were *nolle prossed*,[14] I find SOR ¶ 1.h in favor of Applicant.

Applicant was convicted in 2008 of possession of a firearm while under the age of 21 relating to an incident that occurred in 2007 (SOR ¶ 1.c).[15] I have considered his testimony denying actual possession or ownership of the firearm.[16] I have also considered that he contradicted himself at hearing when he admitted ownership of the firearm and asserted his belief that he possessed it legally regardless of his age because of his military training.[17]

In 2007, Applicant was charged criminally after ignoring the orders of a police officer, who observed Applicant to be yelling in a manner that he deemed to be disturbing the peace (SOR ¶ 1.d).[18] While Applicant was not convicted of those charges, the matter was placed on the court's *stet* docket and he was ordered to complete 32 hours of community service.[19] At hearing, Applicant denied any wrongdoing.[20]

In 2007, Applicant was charged criminally after he operated a vehicle while intoxicated resulting in damage to the garage where it had been parked (SOR ¶ 1.e).[21] There is no evidence in the record about whether he was convicted of these charges. At

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[10] Tr. at 61, 63, 64-66.

[11] *See also* Tr. at 50-53, AE 3.

[12] Tr. at 50-53.

[13] Tr. at 62-63, and 85-89.

[14] GE 12.

[15] GE 4, GE 5, GE 2 at 4, Tr. at 53-56, GE 14.

[16] GE 2 at 4, GE 6, Tr. at 56, 75-76.

[17] Tr. at 54, 55,

[18] GE 7 and 14.

[19] GE 7.

[20] Tr. at 57.

[21] GE 8 and 9, Tr. at 59-61.

hearing, Applicant acknowledged wrongdoing and attributed his actions to being intoxicated.[22]

In 2008, Applicant was charged with possession of marijuana after he admitted to a police officer that the marijuana found in the vehicle that he was driving belonged to him (SOR ¶ 1.f).[23] There is no evidence in the record about whether he was convicted of this charge. At hearing, Applicant initially denied any knowledge of this incident.[24] Later, after he was able to recall the incident, he denied any wrongdoing and claimed that the marijuana was not his but that he admitted to the officer that it was in order to protect his friends who were passengers in the vehicle.[25]

In 2008, Applicant was involuntarily separated from the U.S. Army for a pattern of misconduct to include the incidents alleged in SOR ¶¶ 1.d. and 1.e (SOR ¶1.g).[26] In his response to the separation action in 2008 and at his hearing, Applicant acknowledged wrongdoing.[27]

In 2012, Applicant was convicted of driving with suspended registration (SOR ¶ 1.i).[28] At hearing, he explained that this incident related to a lapse in the insurance coverage required by State A's motor vehicle administration.[29] I have considered his testimony denying that he knowingly drove with a suspended registration and that he remedied the problem.[30] Given the nature of the incident and the circumstances in light of the record as a whole, I find SOR ¶ 1.i in favor of Applicant.

Applicant used marijuana in high school,[31] twice in 2008,[32] and once in approximately 2009 or 2010.[33] He failed to list any marijuana use on either his 2006

[22] Tr. at 59-61.

[23] GE 10.

[24] Tr. at 61.

[25] Tr. at 108-116.

[26] GE 11, Tr. at 61-62.

[27] GE 11, Tr. at 61-62.

[28] GE 13.

[29] Tr. at 63.

[30] Tr. at 89.

[31] Tr. at 64 and 90-91; GE 2 at 19.

[32] Tr. at 92.

[33] Tr. at 97-100.

(SOR ¶ 1.j)[34] or 2009 SCA (SOR ¶ 1.k) by answering "no" to the relevant questions.[35] He also failed to disclose his complete history of marijuana use in his response to 2014 Interrogatories propounded upon him by DOHA (SOR ¶1.l) by stating that he used marijuana in high school and "no use after."[36] Despite his claim at hearing to the contrary,[37] he did not discuss his marijuana use during either his October 2009 or December 2010 security clearance interviews.[38]

At hearing, Applicant claimed that confusion caused him to note in his response to 2014 Interrogatories that he used marijuana in high school "3 weekly." Instead, he claimed that he only used marijuana "three or four times" in high school.[39] While I do not find his confusion claim credible, I find that the discrepancy is not material to the issues at hand, which involve reporting his marijuana use regardless of the frequency.

At hearing, Applicant firmly denied any intention to falsify information on either his 2006 or 2009 SCA or in his response to 2014 Interrogatories.[40] He acknowledged that he marked "no" incorrectly on his 2006 SCA, but claimed that he was coached by his recruiter to do so after he told the recruiter about his high school marijuana use.[41] He also acknowledged that he marked "no" incorrectly on his 2009 SCA, but claimed no specific recollection as to why except for his belief that marijuana was not a drug and that since he only used it "rarely," he did not see it as a problem.[42] Similarly, he referenced a belief that his high school use was "here and there" and not "abuse" by way of explanation for his failure to disclose it.[43] Applicant revealed his post-high school marijuana use only after being cross-examined by Department Counsel at hearing.[44]

Applicant acknowledged that youth, immaturity, and alcohol consumption contributed to his misconduct while in the military. He claims that he is not the same person and that he has matured over the years, especially since he got married and

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[34] GE 15 at p. 19.

[35] GE 1 at p. 36-37, Tr. at 65 ("I didn't deny that I had used marijuana even with the investigator").

[36] GE 2 at 19.

[37] Tr. at 65.

[38] GE 2 at 3-12.

[39] Tr. at 90-91.

[40] Tr. at 64-67.

[41] Tr. 96-95.

[42] Tr. at 97.

[43] Tr. at 65.

[44] Tr. at 97-100.

became a father.[45] A work colleague who has known Applicant for at least five years opines that he is a person of good moral character and judgment. His former manager found him to be dependable and an asset to his customer, his team, and his company. Another friend and work colleague who has known Applicant since 2012 describes him as an excellent problem solver who always exercises good judgment in stressful situations.[46]

Policies

"[N]o one has a 'right' to a security clearance."[47] As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information."[48] The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[49]

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."[50] Thus, a decision to deny a security clearance is merely an indication the applicant has not met

[45] Tr. at 66-70, 79-81.

[46] AE A.

[47] Department of the Navy v. Egan, 484 U.S. 518, 528 (1988).

[48] Egan at 527.

[49] Exec. Or. 10865 § 2.

[50] Exec. Or. 10865 § 7.

the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR.[51] "Substantial evidence" is "more than a scintilla but less than a preponderance."[52] The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability.[53] Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.[54] An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.[55]

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."[56] "[S]ecurity clearance determinations should err, if they must, on the side of denials."[57]

Analysis

Guideline E (Personal Conduct)

The concern under this guideline is set out in AG ¶ 15:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

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[51] *See* Egan, 484 U.S. at 531.

[52] See v. Washington Metro. Area Transit Auth., 36 F.3d 375, 380 (4th Cir. 1994).

[53] *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

[54] Directive ¶ E3.1.15.

[55] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

[56] ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

[57] Egan, 484 U.S. at 531; *See also* AG ¶ 2(b).

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Applicant intentionally falsified materially relevant facts on both his 2006 and 2009 SCAs and in his response to 2014 Interrogatories which establishes AG ¶¶ 16(a) and 16(b). Together with his pattern of misconduct between 2005 through 2008, his falsifications also establish AG ¶¶ 16(c).

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

AG ¶ 17(a) is not established. Applicant failed to avail himself of numerous opportunities to correct the falsifications of his 2006 and 2009 SCAs. Applicant did not discuss his marijuana use during either his October 2009 or December 2010 security clearance interviews. While he revealed his high school marijuana use in his response to 2014 Interrogatories, he failed to disclose post-high school marijuana use and, in fact, affirmatively denied it. Then, at his hearing, he admitted that he used marijuana after high school only after being questioned during Department Counsel's cross-examination.

AG ¶ 17(b) is not established. I have doubts about whether Applicant's recruiter specifically directed him to answer "no" to the relevant drug questions on his 2006 SCA. However, even if I were to find that he did so direct Applicant, this mitigating condition cannot apply given his repeated lack of candor about his marijuana use since then.

AG ¶ 17(c) is not established. If Applicant's pattern of misconduct and questionable judgment had ended in 2008, this mitigating condition could apply due to passage of time and I would have agreed that Applicant is reformed. However, this pattern is brought current by his lack of candor about his marijuana use not only in his 2006 and 2009 SCAs but also in his response to 2014 Interrogatories and during the hearing. Having had an opportunity to evaluate his demeanor and credibility at hearing, I have serious doubts about his current reliability, trustworthiness, and good judgment.

AG ¶ 17(d) is not established. While I credit Applicant with taking responsibility for his wrongdoing related to the allegations in SOR ¶¶ 1.a, 1.b, 1.e, and 1.g., he failed to take any responsibility for his actions related to the allegations in SOR ¶¶ 1.c, 1.d, 1.f, and 1.j through 1.l. Moreover, I am not convinced that the errors in judgment underlying his pattern of misconduct and dishonesty are unlikely to recur.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guideline E in my whole-person analysis, and I have considered the factors AG ¶ 2(a). After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by his pattern of misconduct and questionable judgment, especially his repeated lack of candor about his marijuana use. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 1.a – 1.g:	Against Applicant
Subparagraphs 1.h – 1.i:	For Applicant
Subparagraphs 1.j – 1.l:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge